93-351

NO.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH CARL WHITE — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the double jeopardy clause bars a Defendant's retrial as a Persistent Felony Offender II when he has been acquitted on appeal of Persistent Felony Offender I for insufficient evidence.

TABLE OF CONTENTS

Item:

PAGE

Question Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 2

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 3

Reason for Granting Writ

The Supreme Court of Kentucky, the Kentucky court of last resort, has decided a federal question in direct conflict with the decision of another state court of last resort and with a decision of a United States Court of Appeals. The Kentucky Supreme Court has decided a federal question in direct conflict with applicable decisions of the United States Supreme Court.

Further, the issue herein is extremely similar, if not identical, to the issue in Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992), in which this court granted Certiorari June 14, 1993 (92-1500). This Writ should be granted and joined with Bohlen or an opinion entered in keeping with the Court's decision in that case. 4

Conclusion 7

Appendix 9

A. Order Denying Discretionary Review, Supreme Court of Kentucky 1a

B. Order Denying Petition for Rehearing, Kentucky Court of Appeals 2a

C. Opinion, Kentucky Court of Appeals, 9/25/92 ..... 3a-7a

D. Opinion, Supreme Court of Kentucky, 9/16/93 . 8a-11a

E. Order Granting Discretionary Review, Supreme Court of Ky., 8/30/88 ..... 12a

F. Opinion, Kentucky Court of Appeals, 4/8/88 ... 13a-20a

TABLE OF AUTHORITIES

Cases:

Benton v. Maryland, 395 U.S. 784, 789, 89 Sup.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969) 4

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) 4

Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992) 4, 5, 7

Brown v. Ohio, 432 U.S. 161, 168, 97 S.Ct. 221, 226, 53 L.Ed.2d 187 (1987) 4

Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141, 2149-50, 67 L.Ed.2d 1 (1978) 6

Burllington v. Missouri, 451 U.S. 430, 442, 101 S.Ct. 1852, 1860, 68 L.Ed.2d 270 (1981) 6

Green v. Masey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 15 (1978) 4

Stephens v. State, 806 S.W.2d 812 (Tex.Cr.App. 1990), cert. denied, 59 U.S.L.W. 3772 (U.S. April 29, 1991, No. 90-1668) 5

Tibbs v. Florida, 457, U.S. 31, 41-42, 102, 2211, 2218, 72 L.Ed.2d 652 (1982) 6

White v. Commonwealth of Kentucky, Ky., 770 S.W.2d 222 (1989) 4

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH CARL WHITE — PETITIONER

v.

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, Joseph Carl White, respectfully prays that a Writ of Certiorari be issued to review the opinion of the Kentucky Court of Appeals entered on September 25, 1992 and the Supreme Court of Kentucky's Order denying discretionary review on June 23, 1993.

OPINIONS BELOW

The original opinion of the Kentucky Court of Appeals was rendered on April 8, 1988. The Supreme Court of Kentucky granted limited discretionary review and rendered a limited opinion on March 16, 1989. The Kentucky Court of Appeals rendered a second unpublished opinion September 25, 1992. The Supreme Court of Kentucky denied discretionary review June 23, 1993.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. The Kentucky Court of Appeals opinion was rendered September 25, 1992. The Supreme Court of Kentucky denied discretionary review on June 23, 1993.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall any person be subject for the same ofense to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

The Petitioner was indicted in the Kentucky State Court on October 16, 1985, for Burglary III, Criminal Mischief III, Possession of Burglary Tools and Persistent Felony Offender I (PFO) in violation of KRS 532.080. (Vol. I, pp. 1-3). The Petitioner was convicted of PFO I on November 7, 1986, and received a 10 year sentence. The Petitioner appealed to the Kentucky Court of Appeals. In an opinion rendered April 8, 1988, the Kentucky Court of Appeals reversed the PFO I conviction on the insufficiency of the evidence. The Kentucky Court of Appeals held the Commonwealth only proved the lesser included offense of PFO II. The Supreme Court of Kentucky granted limited discretionary review on August 30, 1988. (TR Vol. II, p. 229, App. p. 12a). The Supreme Court of Kentucky reviewed only whether the double jeopardy clause prevented retrial, Petitioner could be resentenced without retrial or was entitled to a new trial by jury. The Kentucky Supreme Court rendered its opinion March 16, 1989, and held the Petitioner could not be sentenced without retrial, was entitled to a trial by jury but the double jeopardy clause of the United States Constitution did not prohibit retrial in that PFO was a status offense. (TR Vol. II, pp. 241-247, App. p. 8a).

The Petitioner was retried by jury on May 31, 1991, as a PFO II. At said trial the Commonwealth was required to prove the

Petitioner was guilty of being a PFO II beyond a reasonable doubt. The Petitioner was found guilty of being a PFO II and received a five year sentence (TR Vol. II, pp. 297-299). The Petitioner again appealed to the Kentucky Court of Appeals and again argued his retrial was barred by the double jeopardy clause of the United States Constitution.

The Petitioner called the Appellate Court's attention to recent decisions dealing with this double jeopardy issue which had decided this issue in direct conflict with the prior opinion of the Supreme Court of Kentucky. The Kentucky Court of Appeals responded the Supreme Court of Kentucky would be the "form best suited for reconsideration of this issue". (Opinion, Kentucky Court of Appeals, 9/25/92, App. p. 7a). The Kentucky Court of Appeals then declined to address the issue. The Petitioner requested the Kentucky Court of Appeals for a Rehearing which was denied December 18, 1992. (App. p. 2a) The Petitioner then filed a Motion for Discretionary Review with the Supreme Court of Kentucky. The Supreme Court of Kentucky denied discretionary review without comment by Order entered June 23, 1993. (App. p. 1a).

REASON FOR GRANTING WRIT

The Supreme Court of Kentucky, the Kentucky court of last resort, has decided a federal question in direct conflict with the decision of another state court of last resort and with a decision

of a United States Court of Appeals. The Kentucky Supreme Court has decided a federal question in direct conflict with applicable decisions of the United States Supreme Court.

Further, the issue herein is extremely similar, if not identical, to the issue in Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992), in which this court granted Certiorari June 14, 1993 (92-1500). This Writ should be granted and joined with Bohlen or an opinion entered in keeping with the Court's decision in that case.

Double jeopardy protection is provided by the Fifth Amendment of the United States Constitution. This double jeopardy protection is fully applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 789, 89 Sup.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969). PFO I and PFO II are the "same offense for purposes of the double jeopardy protection. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)3. PFO I, the greater offense includes the lesser offense of PFO II. The lesser offense, PFO II, requires no proof beyond the greater offense, PFO I. Brown v. Ohio, 432 U.S. 161, 168, 97 S.Ct. 221, 226, 53 L.Ed.2d 187 (1987). Therefore, the greater offense by definition is the same as any lesser included offense. Reversal of a conviction for a greater offense precludes retrial for a lesser offense. Green v. Masey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 15 (1978).

The Supreme Court of Kentucky in its opinion in White v. Commonwealth of Kentucky, Ky., 770 S.W.2d 222 (1989) (App. p. 3a) at page 224 stated as follows:

> [2] Conviction as a Persistent Felony Offender is not a charge of an independent criminal offense but rather a particular criminal status. Consequently double jeopardy does not attach. Persistent Felony Offender proceedings involve the status of the offender and the length of the punishment, not a separate or independent criminal offense. ... Retrial of White as a second degree Persistent Felony Offender would not be prohibited by the constitutional provisions against double jeopardy.

The Kentucky Supreme Court went on to recognize that Defendants are entitled to a trial by jury on their status as persistent felony offenders. The Kentucky position seems in direct conflict with Stephens v. State, 806 S.W.2d 812 (Tex.Cr.App. 1990), cert. denied, 59 U.S.L.W. 3772 (U.S. April 29, 1991, No. 90-1668). In Stephens, the highest appellate court in Texas held the double jeopardy clause precluded a second trial when the appellate court reversed the Defendant's conviction for aggravated rape due to the insufficiency of the evidence. Double jeopardy barred the subsequent prosecution for the lesser included offense of rape. This well reasoned decision cited an aggregation of U. S. Supreme Court cases, all of which are in direct conflict with the decision of the Kentucky Supreme Court in this case.

Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992), cert. granted June 14, 1993, held the double jeopardy clause does

apply to persistent felony offender trials. The opinion of the United States Appeals for the Eighth Circuit in Bohlen is in direct conflict with the decision of the Kentucky Supreme Court in this case.

This Court has already decided the double jeopardy clause precludes a second trial once an appellate court has determined that the evidence was insufficient to sustain a conviction. Burlington v. Missouri, 451 U.S. 430, 442, 101 S.Ct. 1852, 1860, 68 L.Ed.2d 270 (1981); Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141, 2149-50, 67 L.Ed.2d 1 (1978).

This Court specifically held a verdict of acquittal is final, ending a defendant's jeopardy. A reversal by an appellate court based on the insufficiency of the evidence has the same effect as an acquittal in the trial court. Tibbs v. Florida, 457, U.S. 31, 41-42, 102, 2211, 2218, 72 L.Ed.2d 652 (1982). The Supreme Court of Kentucky decision in this case ignores the applicable decisions of this court and of the United States Court of Appeals for the Eighth Circuit by simply stating that PFO is a status offense and thus the rules of double jeopardy do not apply.

This is an important question of federal law which occurs frequently as most states now having enhancement provisions and this issue should be settled by this Court.

CONCLUSION

This Writ provides the Court with an opportunity to clarify

whether the double jeopardy clause applies to persistent felony offender sentencing. This is a frequently occurring issue and there appears to be direct conflict between the Supreme Court of Kentucky, the United States Court of Appeals for the Eighth Circuit and applicable decisions of this Court. A Writ of Certiorari should be granted to review the opinion of the Supreme Court of Kentucky with consideration given to joinder with Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992) (cert. granted June 14, 1993, No. 92-1500).

Respectfully submitted,

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Supreme Court of Kentucky

93-SC-22-D
(91-CA-1879)

JOSEPH C. WHITE MOVANT

V. JEFFERSON CIRCUIT COURT
NO. 85-CR-1576

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED June 23, 1993.

(s) Robert F. Stephens
Chief Justice

Commonwealth of Kentucky
Court of Appeals

NO. 91-CA-1879-MR

JOSEPH C. WHITE APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH H. ECKERT, JUDGE
ACTION NO. 85-CR-1576

COMMONWEALTH OF KENTUCKY APPELLEE

ORDER DENYING PETITION FOR REHEARING

* * * * *

BEFORE: JOHNSON, McDONALD and STUMBO, Judges.

The Court having considered the Petition for Rehearing and the Response thereto, and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: DECEMBER 18, 1992
JUDGE, COURT OF APPEALS

(S) Michael O. McDonald
Judge, Court of Appeals

RENDERED: September 25, 1992; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 91-CA-1879-MR

JOSEPH CARL WHITE — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HONORABLE JOSEPH ECKERT, JUDGE
CIVIL ACTION NO. 85-CR-1576

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING

** ** ** ** ** ** **

BEFORE: JOHNSON, MCDONALD and STUMBO, Judges.

JOHNSON, JUDGE. In 1986 appellant, Joseph Carl White, was convicted by a Jefferson Circuit Court of burglary in the third degree (KRS 511.040) and sentenced to one year. Additionally, appellant was convicted of being a persistent felony offender in the first degree (KRS 532.080). The conviction on the persistent felony offender charge served to enhance his one year sentence to ten years. In the appeal which followed, this Court reversed the appellant's persistent felony offender in the first degree conviction and remanded the action to the trial court for resentencing of appellant as a persistent felony offender in the second degree.

without a retrial. The Supreme Court of Kentucky granted limited discretionary review and in a published opinion (White v. Commonwealth, Ky., 770 S.W.2d 222 (1989)) determined that appellant could not be resentenced as a persistent felony offender in the second degree without a retrial. Subsequently, appellant was retried, found guilty of being a persistent felony offender in the second degree, and assessed the minimum sentence for the offense, five years. This appeal followed.

Appellant contends that the trial court erred in overruling his motion to suppress as evidence his prior conviction. A motion to suppress this evidence was made during the first trial, and that motion was overruled. Appellant argued this issue during the first appeal, and this Court concluded that the appellant had not met his burden of proof that the felonies were constitutionally infirm. This Court's determination on this issue was not adversely impacted by the Supreme Court's subsequent opinion. It is well-settled that the law of the case doctrine prevents a party from relitigating an issue which has been decided by an appellate court. Williamson v. Commonwealth, Ky., 767 S.W.2d 323, 325 (1989), See Also Gossett v. Commonwealth, Ky., 441 S.W.2d 117 (1969). In this instance, this Court has previously determined that the trial court did not err-in overruling appellant's motion to suppress. Consequently, that ruling became the law of the case, and it may not be relitigated on this appeal.

Appellant contends that the trial procedure followed by the trial court violated the Kentucky Statutes and appellant's constitutional

rights. The preservation of this alleged error is questionable. In Blake v. Commonwealth, Ky., 646 S.W.2d 718, 720 (1983), the Supreme Court of Kentucky determined that an error which contributes to conviction is presumed prejudicial unless it is "harmless beyond a reasonable doubt." Nevertheless, in this case, error, if any, was not in conjunction with the determination of guilt or innocence but instead in conjunction with sentencing. Since appellant received the minimum sentence of five years, the procedure produced no adverse impact during the sentencing stage. Consequently, Blake v. Commonwealth is inapplicable and the imposition of the minimum sentence indicates a lack of prejudice.

Appellant's next claim of error is that the trial court erroneously permitted improper evidence regarding appellant's parole status. On appeal appellant claims that the testimony of Katie Malone, a probation and parole officer, was based in part upon inadmissible hearsay evidence. Additionally, appellant claims that the testimony concerning a parole violation should not have been allowed due to the fact that it was inadmissible and prejudicial.

The record reflects that trial counsel for appellant objected to the introduction of evidence concerning parole violations and extension of the expiration date of appellant's parole. The objection was overruled. Counsel for appellant in the absence of a request by the trial court placed into the record his grounds for the objection. Specifically, counsel for appellant stated that the reasons for the extension of the parole expiration date were immaterial. In Crain v. Dean, Ky., 741 S.W.2d 655, 657 (1987),

the Supreme Court of Kentucky observed that "[i]f a party chooses to state grounds (for an objection) in the absence of a request from the court, he is bound thereby." The claim of error based upon inadmissible hearsay was not advanced to the trial court as a ground for the objection; consequently, the hearsay issue is not properly before this Court. The issue preserved by trial counsel's objection concerns the admissibility of information concerning the extension of the parole expiration date. Appellant's reliance upon Burton v. Commonwealth, Ky.App., 715 S.W.2d 897 (1986), is misplaced. Burton indicates that assessment of the minimum sentence, as did happen in this case, serves to remove the speculation as to the prejudicial effect of inadmissible evidence. Burton v. Commonwealth, 715 S.W.2d at 899. Furthermore, the Commonwealth is allowed to prove the date of release of confinement or supervision, and in this case, explain the reason why the original parole expiration date was extended.

Appellant's final argument is that his retrial as a persistent felony offender, second degree is barred by the double jeopardy clause of the United States and Kentucky Constitution. During the appeal of the first trial, the Kentucky Supreme Court addressed this issue. The Court stated,

> Conviction as a Persistent Felony Offender is not a charge of an independent criminal offense but rather a particular criminal status. Consequently double jeopardy does not attach. Persistent Felony Offender proceedings involve the status of the offender and the length of the punishment, not a separate or independent criminal offense.

White v. Commonwealth, Ky., 770 S.W.2d 222, 224 (1989). In this

instance, the Supreme Court would be the forum best-suited for reconsideration of this issue. This Court will abide by their previous determination. S.C.R. 1.030(8)(a) See Special Fund v.Francis, Ky., 708 S.W.2d 641 (1986). Accordingly, the judgment of the trial court is AFFIRMED.

ALL CONCUR.

ATTORNEY FOR APPELLANT:

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ATTORNEYS FOR APPELLEE:

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RENDERED: March 16, 1989
NOT TO BE PUBLISHED

Supreme Court of Kentucky

88-SC-300-DG

JOSEPH CARL WHITE
and MARITA RENEE COMBS — APPELLANTS

v.

ON REVIEW FROM COURT OF APPEALS
86-CA-2718
(Jefferson Circuit Court #85-CR-1576)

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

REVERSING AND REMANDING

This appeal is from a decision of the Court of Appeals which held that the trial judge may resentence White as a Persistent Felony Offender II without retrial.

White and Combs were originally convicted of third degree burglary and criminal mischief. The jury assessed a sentence of one year for the burglary and a $250 fine for the criminal mischief. White's sentence was enhanced to ten years pursuant to PFO I. His fine was probated and Combs' sentence was probated for five years. The Court of Appeals reversed White's PFO one conviction on the ground that the two prior felonies used to enhance punishment constituted only one previous conviction under KRS 532.080(4) and remanded for the

sentencing of White by the trial judge as a PFO II. We granted review on the issue of whether the trial court may resentence White as a PFO II without retrial.

The action by the Court of Appeals raises two issues: 1) May White be sentenced as a PF0 II without first being retried under a PFO II instruction; and 2) May the judge impose the sentence.

The indictment which originally charged White as a being a PFO I was sufficient to allow for a conviction as a PFO II. KRS 505.020(2) provides that "[a] defendant may be convicted of an offense that is included in any offense with which he is formally charged." Although the indictment was sufficient, nevertheless the jury must be instructed on PFO II and decide his guilt or innocence.

White argues his retrial as a PFO II is barred by the double jeopardy clause. We disagree. Gill v. Commonwealth, Ky.. 648 S.W.2d 846 (1983) is dispositive of this matter. In that case, the defendant was convicted as a PF0 I but the conviction was set aside because of insufficient evidence to sustain a guilty verdict.

The order setting aside the verdict did not address the issue of sufficiency of the evidence as a PFO II. It was held that a trial on the charge of PFO II was not barred by the double jeopardy clause. Here there was insufficient evidence of PFO I but sufficient evidence and a finding of guilt on all the elements of PFO II . Therefore, a retrial would not be barred by double jeopardy. Wilson's citation to Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) is not persuasive.

A PFO trial does not involve an independent criminal offense

but rather a status which enhances punishment for a crime committed by a person who is an habitual criminal. Malicoat v. Commonwealth, Ky., 637 S.W.2d 640 (1982) held that double jeopardy is not involved as a result of the repeated use of the same felony conviction to enhance punishment. Cf. Montgomery v. Bordenkircher, 620 F.2d 127 (6th Cir. 1980).

Conviction as a Persistent Felony Offender is not a charge of an independent criminal offense but rather a particular criminal status. Consequently double jeopardy does not attach. Persistent Felony Offender proceedings involve the status of the offender and the length of the punishment, not a separate or independent criminal offense. Kentucky Constitution Section 13 and KRS 505.040(1)(A) both relate to an offense before double jeopardy is activated. Retrial of White as a second degree Persistent Felony
Offender would not be prohibited by the constitutional provisions against double jeopardy.

Although the criminal defendant has no right to jury sentencing under the United States Constitution, the General Assembly of Kentucky has created a statutory right for criminal defendants. KRS 532.080; KRS 532.055(2). The Court of Appeals decision would abrogate this right and therefore it is in error. Based on our examination of the commentary, it is our belief that the legislative intent of the General Assembly in adopting KRS 532.080 was to permit a jury to consider the matter of sentencing White as a Persistent Felony Offender II.

The decision of the Court of Appeals is reversed and this matter is remanded to the trial court for the jury to re-try White as a second-degree persistent felony offender pursuant to proper instructions from a trial judge. If convicted, he shall be sentenced by the jury.

Stephens, C.J., and Combs, J., concur. Leibson, J., concurs in result only. Vance, J., dissents by separate opinion in which Gant and Lambert, JJ., join.

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SUPREME COURT OF KENTUCKY
88-SC-000300-D
(86-CA-002718)

JOSEPH CARL WHITE and
MARTIA RENEE COMBS — MOVANTS

V.

JEFFERSON CIRCUT COURT
NO. 85-CR-001576

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER GRANTING DISCRETIONARY REVIEW

The motion of the movants for a review of the decision of the Court of Appeals is granted. Review is limited to the issue of whether the trial court may resentence movant White as a persistent felony offender in the second degree without retrial.

The Clerk of the Court of Appeals is directed to transfer to the Clerk of the Supreme Court the entire record of this proceeding.

ENTERED August 30, 1988.

(s) Robert F. Stephens
Chief Justice

OPINION RENDERED: April 8 1988; 3:00 p.m.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 86-CA-2718-MR

JOSEPH CARL WHITE and
MARITA RENEE COMBS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH H. ECKERT, JUDGE
ACTION NO. 85-CR-1576

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING IN PART - REVERSING AND REMANDING IN PART

* * *

BEFORE: HAYES, MILLER and WILHOIT, Judges.

HAYES, JUDGE: The appellants were spotted by a Louisville Police Officer at 4:45 A.M. in an automobile leaving a parking lot where a tropical plant business operated out of a large tent. There were two to three tropical plants sticking out of the open car trunk and there were two to three similar plants in the back seat of the automobile. As expected, the policeman stopped the automobile, asked for identification, and asked the occupants to accompany him back to the

tropical plant business, which they did. Upon discovering the tent had been slashed, the officer intended to arrest the appellants; however, they fled the scene and later surrendered to authorities.

Appellants were tried and convicted of third-degree burglary and criminal mischief. Appellant White was additionally found to be a persistent felon in the first degree.

The appellants raise a search and seizure issue which gives us no concern and requires no comment. They also raise the issue of the constitutionality of the possession of burglary tools statute which does not concern us either since neither appellant was convicted of that crime. Therefore, the conviction of appellant Combs is affirmed. The assignment of error concerning the persistent felony offender portion of the case, which applies only to appellant White, does give us concern.

This issue is attacked on two grounds: (1) The previous felony convictions used were constitutionally infirm; and, (2) both felony convictions were served concurrently, therefore under KRS 532.080(4) they were deemed to be but one conviction which precluded a conviction for persistent felony offender in the first degree.

The motion to suppress, obviously prepared sometime in June, 1986 was filed with the trial court on Wednesday, September 14, 1986 and, according to the trial judge, was brought to his attention during the trial on the burglary charges. The motion was argued, according to the record, immediately before the empaneling of the jury on the persistent felony offender charge.

The record contains clear evidence that the appellant White intended to contest the validity of his prior felony conviction some three months before trial, but waited to bring this issue to the trial court's attention, and we suppose to the Commonwealth attorney's attention, to either during the trial of the burglary offense or immediately before the empaneling of the jury on the persistent felony offender charge which was the following day. The motion to suppress was untimely and the trial court would not have committed reversible error in refusing to hear White on this issue. See Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984).

The trial court did however have a hearing in which evidence was introduced by the Commonwealth that White had been convicted on February 8, 1973 for carrying a concealed deadly weapon on February 2, 1972. He was also convicted on June 6, 1973 for an armed robbery he committed on October 19, 1972. White, on direct examination, stated he was represented by an attorney in both cases but the attorney wasn't present when he pled guilty to both charges. He also alleges that the trial court never asked him any questions, presumably even whether he wished to change his plea of not guilty to guilty. On cross-examination, White "couldn't remember" the exact proceedings or what occurred, however, he did recall the attorney being present and conversing with the trial court at the June 6, 1973 sentencing. He also stated he voluntarily pled guilty to the armed robbery charge on June 6th. On re-direct he again stated he had no knowledge of any of his constitutional rights

before he pled guilty. The trial court found as a fact that upon the whole record, appellant did not meet his burden of proof that the felonies were constitutionally infirm.

The trial court indicated he relied upon the case of Corbett v. Commonwealth, Ky., 717 S.W.2d 831 (1986). The appellant relies upon the case of Dunn v. Commonwealth, Ky., 703 S.W.2d 874 (1986). Dunn, prior in time to Corbett, outlined the procedure to be followed upon the filing of a proper motion to suppress under Commonwealth v. Gadd, supra. That procedure is:

(1) The Commonwealth proves the judgments of conviction in each of the underlying offenses upon which it intends to rely.

(2) The defendant then has the burden to show any infringement of constitutional rights or irregularities of procedure upon which he relies.

(3) The Commonwealth then has the burden of proving that the underlying judgment was entered in a legally acceptable manner.

The court in Dunn went further to state the presumption of regularity of judgments would suffice to pass step (1) above, however, a silent record would not suffice under step (3), but evidence produced through the cross-examination of the defendant might, regardless of the silent record.

Corbett, first of all, does not hold that a motion to suppress a prior felony conviction as being constitutionally invalid has to be filed in the court where the conviction was had. That proposition is in the concurring opinion of three

Kentucky Supreme Court justices. Corbett did add to the above mentioned Dunn procedure, however, that in reference to step (3), mere disbelief of the appellant's testimony may not solely "form the basis for affirmative findings by the court but that such disbelief may certainly negate inferences in his favor." Corbett, supra, at 836; citing Marshall v. Lonberger, 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). What the Marshall court actually said was: "While disbelief of respondent's testimony may not form the basis for any affirmative findings by the State trial court on issues with respect to which the State bore the burden of proof, it certainly negates any inferences favorable to the respondent . . . ." Marshall, at 435. (Emphasis added).

In the present case the Commonwealth did not have the burden of proving the underlying convictions were constitutionally invalid, the appellant did (step 2 of the Dunn procedure). There is sufficient evidence in this record[1] that supports the trial court's finding that appellant did not meet his burden of proof under step 2 of Dunn, negating any duty on the Commonwealth under step 3.

The Commonwealth admits error by the trial court in instructing the jury on the Persistent Felony Offender in the first-degree charges

---

[1]At one point in appellant's testimony he stated he voluntarily pled guilty to the armed robbery charge and that his attorney was with him during this time and was engaging in a colloquy with the trial court. At other times during his testimony, appellant stated he was sentenced without even having appeared before the trial court.

because appellant received concurrent sentences on the two prior felony convictions which constitute only one previous conviction under KRS 532.080(4).

However, because our research discloses that the facts of our case have not been addressed by an appellate decision, we have closely examined those facts in light of Combs v. Commonwealth, Ky., 652 S.W. 2d 859 (1983), upon which the trial court rested its decision that appellant could be tried for being a first-degree persistent felony offender. The trial judge apparently relied upon the following language from that opinion:

> The concurrent sentence break is provided only to those who may have committed more than one crime but received their sentences for these crimes prior to serving any time in prison. 652 S.W.2d at 862.

We acknowledge that this statement could have mislead the prosecutor and the trial judge into believing that Combs applies to appellant White's case, as he had served four months in the penitentiary before he was convicted of the armed robbery offense. We are convinced that the above quoted language from Combs does not accurately reflect the intent of the persistent felony offender statute or the truc holding in Combs.

The proper interpretation to be given this case is summarized in the last paragraph of the opinion, quoting Williams v. Commonwealth, Ky. App., 639 S.W.2d 788 (1982):

> It is clear from the wording of the statute and the Commentary thereto that a person who, in appellant's situation, serves time in prison for a felony, is released on parole, commits another crime and is resentenced to

> prison, that upon his release again and third conviction, he has two prior felonies for purposes of a persistent felony offender charge. That is, the rehabilitative efforts on his first conviction failed, the rehabilitative efforts on his second conviction failed, and he is, under the statute, a persistent felony offender in the first degree upon receiving his third conviction .... Id. at 790.

Unlike Combs or Williams, appellant White committed both crimes used to enhance his third conviction before he had any exposure to rehabilitative efforts and they must therefore be considered one crime for purposes of the persistent felon stage of his conviction. Because the persistent felon stage of the proceedings concerns the status of the offender and not an offense, we are convinced that the trial judge may resentence appellant White without retrial. Implicit in the jury's finding appellant guilty of being a persistent felon in the first degree is a finding of guilt on each element required for conviction as a second-degree persistent felony offender; thus there is nothing new to be relitigated. That portion of the judgment which convicts appellant White of being a persistent felon in the first degree is reversed for resentencing on the status of being a second-degree persistent felony offender. In all other respects the judgment is affirmed.

MILLER, JUDGE, CONCURS.
WILHOIT, JUDGE, DISSENTS.

WILHOIT, JUDGE, DISSENTING. I respectfully dissent from the majority opinion insofar as it remands this case for the appellant to be resentenced by the court as a second-degree felony offender. The appellant is entitled to have a jury set his sentence. See YRS 532.080(1); Commonwealth v. Crooks, Ky., 655 S.W.2d 475 (1983).

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